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No. 03-898

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In The

# Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande, MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,
Respondents,

On opposition for a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

## REPLY IN OPPOSITION TO AMICI CURIAE PETITION IN SUPPORT OF PETITIONER

From the Federal District Court of San Juan, Puerto Rico No. 01-1244 (JAF) and First Circuit Court of Appeals No. 02-2539; 03-1074

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March 31st, 2004

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## QUESTION PRESENTED

Whether the First Circuit properly held the state of mind element of an underlying intent-based constitutional claim merges with the qualified immunity inquiry.

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## INTRODUCTION

On March 4th 2004 Mr. Frank Guerra and Mr. Carlos del Valle filed a Brief of Amicus Curiae In Support of Petitioner representing several municipalities of Puerto Rico.

Respondent wish to supplement Opposition to the Petition for the Writ of Certiorari and to address the Amicus Curiae arguments according to Rule 15.8 of the US Supreme Court.

The jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres, and the First Circuit Court of Appeals affirmed that verdict. No errors were committed by the courts below, and the jury's findings are not attacked in the Petition for a Writ of Certiorari or Brief by the Amicus Curiae. As we discussed in the Reply Brief, the legal contentions in that Petition are wholly without merit, and not such writ should be granted.

Before delving exclusively[1] into the Amicus Curiae's main arguments, it should be noted that, hidden underneath Petitioners' certiorari request to this Court, is their counsel's attempt to cover-up their faults during the trial proceedings as described in the Respondent's Reply Brief.[2]

The Amicus Curiae present a biased, self serving and interested party where Brother Attorneys represent

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[1] Respondent request that the Reply Brief filed on March 2nd 2004 be considered as part of this Supplemental Brief.

[2] Petitioners also tried to cover-up each attempt to justify the deceitful termination of a 20-year-career municipal employee without due process, because such attempts backfired before the jury.

municipalities that have been sued in the Federal Court after the largest and biggest political generalized and institutionalized campaign to persecute, demonize, discriminate and violate the basic and fundamental constitutional rights against any person who is Pro-American in Puerto Rico by the Colonialist and Anti-American Popular Party. Amicus Curiae they are not, they are friends of only one party in this case.

On the appeal to the First Circuit or in the original Petition for Certiorari, Petitioners does not attacked the Jury findings but pretend their "friends" after four Appeals to the First Circuit re-litigate the factual evidence of this case. Those four appeals are 04-1220, 03-1761, 03-1074 and 02-2539

The Amicus Curiae is a parallel instrument used by Petitioners as a dilatory tactic for frivolous petitions to clearly abuse the judicial process.

In the *Brief of Amicus Curiae in Support of Petitioner*, page 6, 3rd paragraph, it is argued that "[s]ince the submission of the petition for writ of certiorari in this case, the First Circuit has issued two other opinions which attempt to fill the 'void' left by Acevedo-Garcia and Rivera-Torres concerning the reasoning behind their dissent based construction of Crawford-El. These two recent First Circuit opinions, which deal with First Amendment claims and **the application of qualified immunity, expose an intra circuit split.**" (Emphasis added)

Just a cursory glance of both opinions is needed to conclude that the Amicus Curiae either neglected to read carefully the aforementioned opinions or simply did not get their holdings. First of all, **there is no circuit split at all that can be ascertained from those opinions.** Neither Harlow nor Crawford-El is even mentioned in Fabiano v. Hopkins, 352 F.3d 447 (1st Cir. 2004). Moreover, Mihos v. Swift, 358

F.3d 91 (1st Cir. 2004) and Fabiano follow step by step the same old and traditional qualified immunity analysis where in the first step, in assessing **whether the facts as alleged make out a constitutional violation** the Fabiano court determined:

> "In the third and final step in establishing a First Amendment violation, **Fabiano must show that his protected speech was a substantial or motivating factor in the City's decision to fire him.** See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Mullin, 284 F.3d at 38. **This requirement is satisfied. Hopkins was holding a copy of the Zoning Board complaint in her hand when she fired Fabiano, and in her affidavit below she cited the lawsuit as one of several reasons underlying the termination (although she took pains to emphasize that the method by which Fabiano sued the City, not the suit itself, was the cause).** It may well be that a fact finder would determine that Fabiano's deficiencies in professional judgment, not the lawsuit itself, was the primary cause of the firing. But, taking all inferences in favor of Fabiano, as we are bound to do, **we conclude that he has adduced sufficient evidence of causation for purposes of our review.**" Fabiano v. Hopkins, supra at 457. (Emphasis added)

Admittedly, it was at the second step of the qualified immunity analysis, in assessing **whether that right was clearly established**, that the Fabiano court deemed applicable the defense:

> **"The facts of this case do not present the sort of unusual circumstances that would support the finding of a clearly established right**

> notwithstanding Pickering. As we noted supra, there is a very close question as to whether Fabiano's allegations made out a constitutional claim. Fabiano's supervisors had, on at least one formal occasion, stated a basis for distrusting his judgment, see Dirrane, 315 F.3d at 71, and were reasonably concerned about the potential conflict of interest (and the appearance of such conflict) that his Zoning Board lawsuit entailed. **We cannot say that they knew or should have known that firing Fabiano under these circumstances was unlawful.** Accordingly, we conclude that Joyce and Hopkins are entitled to qualified immunity on Fabiano's First Amendment claims." Fabiano v. Hopkins, at 457-458. (Emphasis added)

Consequently, there is no "contrast" between the Mihos and the Fabiano opinions, as **both of them take into consideration the "motivating factor" during the first step of the qualified immunity analysis.** The different results reached at the end are irrelevant to the criteria used during the analysis.

Just as a cursory glance of both opinions is needed to conclude that the Amicus Curiae either neglected to read carefully the aforementioned opinions or simply did not get their holdings, the rest of the *Brief of Amicus Curiae in Support of Petitioner* deserves the same characterization inasmuch as it disrespectfully argues that "the plaintiff had submitted his letter of resignation in an underhanded effort to avoid being disciplined for his chronic absenteeism. Who would have thought that under the First Circuit's subjective intent standard, the First Amendment now effectively protects a plaintiff's **pathological absenteeism**?" *id.* at page 10, 2nd paragraph. **The jury has already settled who the pathological liar is in this case.** In any event, petitioners

requested from respondent's physician his medical records and the physician answered several days afterward -in early July of 2000- in spite of petitioner's allegation that the letter was "received" on October 31st 2000. In the meantime -in September 20, 2000- the Mayor had publicly said in a radio broadcast that respondent was a crook and it was not until November 13th 2000, when the Mayor accepted his resignation –five (5) months after the 15-day term provided by the regulations. Accordingly, the "fair and clear warning" that those cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage. Hope v. Pelzer, 536 US 730, 746 (2002).

## CONCLUSION AND PRAYER

For the reasons stated above, Respondents request the Court to deny Petitioners' Petition for a Writ of Certiorari.

**RESPECTFULLY SUBMITTED**, March 31st 2004.

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